

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CITIGROUP GLOBAL MARKETS REALTY  
CORPORATION,

UNPUBLISHED  
March 25, 2014

Plaintiff-Appellee,

v

No. 309019  
Montmorency Circuit Court  
LC No. 11-002761-AV

PAUL SCHMITZ and DEBORAH SCHMITZ,

Defendants-Appellants.

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Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

In this foreclosure action, defendants appeal as on leave granted<sup>1</sup> an order of the circuit court affirming the district court's grant of a judgment of possession in favor of plaintiff. We affirm.

In 2007, defendants obtained a loan from Accredited Home Lenders, Inc, and executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc (MERS), the nominee for Accredited Home Lenders. The original mortgage was not recorded. MERS assigned its interest to Liquidation Properties, Inc, which recorded an "Affidavit of Lost Mortgage." Attached to the affidavit was a copy of the original mortgage. Liquidation Properties assigned the mortgage to plaintiff. Plaintiff initiated foreclosure by advertisement proceedings because defendants defaulted on the mortgage. Plaintiff subsequently purchased the real property at the sheriff's sale, and, almost a year after doing so, commenced the instant action in district court seeking to evict defendants from the property. The district court granted that request. Defendants appealed to the circuit court, which affirmed. This appeal followed.

The issue presented in this appeal is whether the "Affidavit of Lost Mortgage" satisfies the requirement of a "properly recorded" mortgage, as set forth in MCL 600.3204(1)(c), for foreclosure by advertisement. Defendants assert that the issue is unpreserved, but we disagree because it was raised in the district court, the circuit court, and the application for leave to appeal. See *People v Dunn*, 104 Mich App 419, 427; 304 NW2d 856 (1981). The issue was

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<sup>1</sup> *Citigroup Global Markets Realty Corp v Schmitz*, 494 Mich 854, 854; 830 NW2d 754 (2013).

preserved in the district court regardless of any deficiencies in the written brief. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Moreover, the issue “involves a question of law for which the record before us contains all the facts necessary for resolution.” *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 290 n 3; 818 NW2d 460 (2012). We review de novo an issue of statutory interpretation. *Id.* at 287.

MCL 600.3204(1) reads as follows:

Subject to subsections (4) and (6), a party may foreclose a mortgage by advertisement if all of the following circumstances exist:

(a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.

(b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.

(c) The mortgage containing the power of sale has been properly recorded.

(d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

There is no dispute that the only issue is whether § 3204(1)(c) has been satisfied by the recording of the Affidavit of Lost Mortgage in lieu of the original mortgage.<sup>2</sup> All other portions of the statute are irrelevant or have been satisfied.

As an initial matter, the affidavit is *not*, itself, a mortgage. MCL 565.201 sets forth various recording requirements. See *In re Moukalled Estate*, 477 Mich 986, 986; 725 NW2d 469 (2007). Pursuant to MCL 565.201(1)(a), an instrument in any way disposing of an interest in real estate must, inter alia, include “the original signature or mark” of “each person purporting to execute the instrument.” Here, the Affidavit of Lost Mortgage only included a *copy* of the original mortgage, which in turn only included a *copy* of each grantor’s signature. Additionally, MCL 565.8 provides that an instrument must be acknowledged before a judge, court clerk, or notary public, and MCL 565.47 provides that any instrument not so acknowledged may not be recorded by the county register of deeds. The original mortgage, again, was acknowledged before a notary public, but the *copy* of the original mortgage was not. The affidavit itself

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<sup>2</sup> MCL 600.3204 was enacted by 1961 PA 236. In *Austin v Anderson*, 279 Mich 424; 272 NW 730 (1937), our Supreme Court applied a predecessor statute and held that the failure to maintain a recorded mortgage precluded foreclosure by advertisement. *Id.* at 428; see also *Michigan Fire & Marine Ins Co v Hamilton*, 284 Mich 417, 420; 279 NW 884 (1938).

likewise did not contain the “original signature or mark” of the party ostensibly conveying a property interest. The Affidavit of Lost Mortgage, in short, failed to satisfy several recording requirements and should not have been accepted for recording as an independent legal instrument.

Nevertheless, it is at least reasonably arguable that the Affidavit of Lost Mortgage could properly have been recorded pursuant to MCL 656.451a. That statute allows the recordation of affidavits stating various facts that “may affect the title to real property.” MCL 565.452(1) provides that “[t]he register of deeds of the county where an affidavit described in this act is offered for record shall receive and record it in the manner that deeds are recorded.” We presume—although we do not now decide—that the affidavit was properly filed under these sections. However, such an affidavit does not *itself* affect title to real property, and indeed only states facts that “*may* affect the title to real property” (emphasis added). In any event, MCL 600.3204(1)(c) unambiguously requires recording of the mortgage itself, not merely a statement to the effect that such a mortgage exists. Consequently, the Affidavit of Lost Mortgage did not operate to record the mortgage itself.

Therefore, the Affidavit of Lost Mortgage did not satisfy MCL 600.3204(1)(c).<sup>3</sup> However, that does not necessarily entitle defendants to reversal.

“‘The authority to foreclose such mortgages by advertisement is purely statutory, and all the requirements of the statute must be substantially complied with.’” *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 109; 825 NW2d 329 (2012), quoting *Miller v Clark*, 56 Mich 337, 340; 23 NW 35 (1885). Substantial compliance with mortgage statutes will be sufficient to allow foreclosure so long as the equities ultimately favor doing so and the party being foreclosed upon is not prejudiced by any failure to comply strictly with the statutes. *Mills v Jirasek*, 267 Mich 609, 614-615; 255 NW 402 (1934). “[D]efeats or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*.” *Kim*, 493 Mich at 115. Consequently, “it would require a strong case of fraud or irregularity, or some peculiar exigency, to warrant setting a foreclosure sale aside.” 497 *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 497; 739 NW2d 656 (2007) (citations and internal quotation marks omitted).

There appears to be no allegation of fraud in this appeal, nor any allegation that the mortgage to which the Affidavit of Lost Mortgage is fictitious or itself fatally defective. We agree with the circuit court that the purpose of the recording statutes is to provide notice to third parties of what is being recorded. *Michigan Fire & Marine Ins Co v Hamilton*, 284 Mich 417, 419; 279 NW 884 (1938). The Affidavit of Lost Mortgage here would put third parties on notice, and provide evidence, of the existence of the mortgage. Consequently, although it technically fails to comply with MCL 600.3204(1)(c), it complies in substance. Therefore, the foreclosure here is defective, but it is voidable rather than void, and “to set aside the foreclosure sale, [defendants] must show that they were prejudiced by [plaintiff]’s failure to comply with MCL 600.3204.” *Kim*, 493 Mich at 115.

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<sup>3</sup> We note that other courts have also concluded that an affidavit of lost mortgage does not operate as a recorded mortgage. See, e.g., *In re Neal*, 406 BR 288 (ED Mich, 2009).

We recognize that under *Kim*, the trial court should generally determine whether noncompliance with MCL 600.3204(1)(c) warrants setting aside the foreclosure sale. Nevertheless, we affirm because the facts show that defendants cannot demonstrate prejudice as a result of noncompliance with MCL 600.3204(1)(c). In *Sweet Air*, this Court determined that the mortgagors could not demonstrate prejudice because “they made no effort to redeem or take any action until well after the redemption period had run,” and they “waited until the [mortgagee] instituted proceedings to evict them before they took any action to challenge the foreclosure sale.” *Sweet Air*, 275 Mich App at 503. Although we have not been provided with the record from the district court, it is not disputed that defendants made no challenge to the foreclosure proceedings until plaintiff pursued eviction after the redemption period ended. Defendants have also not disputed the validity of the copy of the original mortgage that was attached to the Affidavit of Lost Mortgage. The record simply does not show that defendants “would have been in a better position to preserve their interest in the property absent [plaintiff’s] noncompliance with the statute.” *Kim*, 493 Mich at 116.

In sum, MCL 600.3204(1)(c) was not satisfied because “[t]he mortgage containing the power of sale” was not “properly recorded.” The “Affidavit of Lost Mortgage” is not itself the mortgage and may not be recorded as such. However, because the affidavit substantially satisfied the ultimate purpose of the recording statute, the foreclosure was defective but only voidable rather than void. Defendants have not shown how they were prejudiced by the noncompliance with MCL 600.3204(1)(c), so the foreclosure will stand.

Affirmed.

/s/ Amy Ronayne Krause  
/s/ E. Thomas Fitzgerald  
/s/ William C. Whitbeck